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Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

JEROME A. NEVIUS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The petition of said Jerome A. Nevius for a review on writ of certiorari of the decision of the Ohio Supreme Court respectfully shows:

STATEMENT OF MATTER INVOLVED.

Stated as briefly as possible, this cause was tried in the Court of Common Pleas of Clark county, Ohio. The judge thereof will hereinafter be referred to as the trial judge. From the beginning of these proceedings and until they were terminated in said Common Pleas Court, the trial judge followed a course of conduct indicating a strong bias and prejudice against your petitioner.

On October 2, 1944, the trial judge, without granting a hearing to your petitioner as prosecuting attorney of Clark county, appointed an assistant prosecuting attorney for said county to procure an indictment against the petitioner, stating in the entry of appointment that "the present prosecuting attorney was under a 'certain disability'." (R., 16.)

Before finding that petitioner was under a "certain disability" there was no hearing had. (R., 20.) The petitioner was given no opportunity whatsoever to appear before the court and to explain his conduct, and to have rights of a hearing as prescribed by the Supreme Court of Ohio. The trial court took this action during the heat of a political campaign wherein petitioner was a candidate for his third term—as prosecuting attorney. This effort of the trial judge to embarrass the petitioner in his campaign for re-election was of no avail, however, and petitioner was re-elected, being the only candidate of his party to be elected in said county.

On December 5, 1944, as a result of the efforts of the trial judge, petitioner was indicted, together with certain known gamblers, in an indictment containing six

counts. (R., 2-6.) Said indictment contained three counts, second, fourth and sixth, charging petitioner with receiving certain bribes and the other three counts charged the said gamblers with giving said bribes. (R., 2-6.) Is it not strange that even to this date the trial judge has not ordered the gamblers tried? This indicates the bias and prejudice of the trial court to the petitioner.

Further demonstrating his bias and prejudice, the trial court manifested feverous interest and activity in securing the indictment against the petitioner and his conviction. (R., 15-18, 938.) The trial court secured the services of assistant prosecutors and appointed them and interested himself in securing compensation for them. (R., 16.) He shared his chambers with these assistant prosecutors and conferred with them in the preparation of the evidence and procedure against the petitioner. (R., 919-20.) He arranged for the use of two state highway patrol officers to assist the assistant prosecuting attorney, appointed by the court, to interview witnesses and to gather evidence against the petitioner. (R., 904.) Such use of the state highway patrol officers was contrary to the law of Ohio. (R., 45.) The trial judge conferred with these two state highway patrol officers from time to time while they were engaged in building up a case against the petitioner. (R., 904-905.)

After the indictment was returned against the petitioner, the trial judge used his power, authority, and prestige, to summon witnesses to appear before him and to give testimony under oath in an effort to prepare a case against the petitioner. (R., 45, 900-904.) The petitioner was not advised of the taking of such testimony

to be used against him, nor was he in any manner notified of such proceeding.

The presence of the accused is mandatory. There is no authority whatsoever in the law of Ohio, for any procedure, as here taken, after the return of the indictment.

The trial judge delivered to the prosecution certain private letters that he had received, containing hearsay matter about the petitioner, which was then caused to be published in the press in Clark county to inflame the public mind to the prejudice of the petitioner. (R., 45, 914-919.)

Your petitioner strenuously objected to all of this procedure on the part of the trial court. He filed an affidavit of prejudice and bias in the Supreme Court of Ohio to have the trial judge removed, and this affidavit was heard by the chief justice of the Supreme Court of Ohio, who refused to remove the trial judge. (R., 19.) A second affidavit of prejudice and bias was filed in which your petitioner alleged that the trial judge was disqualified to sit in the trial of his case; that he, the petitioner, was entitled to a fair and impartial presiding judge; and that to permit said trial court manifesting such bias and prejudice to sit would deprive petitioner of his rights as a citizen of the United States of America of the due process of law guaranteed him under the Fourteenth Amendment to the Constitution of the United States. (R., 44-45.) Your petitioner offered in evidence at this hearing eighty affidavits made by reliable and responsible citizens of Clark county, in which they swore under oath that petitioner could not have a fair trial with said trial judge presiding. The chief justice ruled

that this evidence was not admissible. (R., 895.) Your petitioner established at the hearing on the second affidavit of bias and prejudice that the trial judge could not preside over this cause in a wholly free, disinterested, impartial and independent capacity. At this hearing the trial judge himself admitted that he had a pecuniary interest in the outcome of the trial, as he was vice-president, stockholder, and member of the board of directors of a corporation which maintained and carried on a highly lucrative gambling lottery in numerous theatres within the jurisdiction of said judge in violation of the Constitution and laws of Ohio. (R., 907-911.)

Your petitioner, as prosecuting attorney, had attempted to present evidence to the grand jury of the lottery in which the trial court was active, which would have resulted in the ouster of said corporation from the state of Ohio, and would further have resulted in substantial pecuniary loss to the trial judge, as a stockholder in the corporation which was conducting the lottery. (R., 939-40.) Fuel was added to the bias and prejudice of the trial court against the petitioner from his knowledge that if the grand jury took action against the gambling operations of the trial judge, his office as judge might well be imperiled.

The chief justice of the Supreme Court of Ohio clearly recognized the federal question raised, and in his opinion, refusing to unbench the said trial judge, spoke in part as follows:

> "In conclusion, Mr. Nevius says in his affidavit, that by reason thereof said judge is disqualified to sit in the trial of this case as a fair and impartial presiding officer, and the defendant, Jerome A.

> Nevius, is being deprived of his rights of a citizen of the state of Ohio and of the United States, of the due process of law as guaranteed to him by Article I, Section 16 of the Constitution of the state of Ohio, and under the Fourteenth Amendment to the Constitution of the United States of America." (R., 958.)

The chief justice of the Supreme Court of Ohio did, however, leave the decision with the said trial judge whether he would sit in the trial or ask the assignment of another judge. From the opinion of the chief justice on this point is the following:

> "I want to repeat the thing that was said at the conclusion of the hearing on the position of the court here at the first hearing on the affidavit of prejudice when it was said to counsel in the case that the overruling of the matter of bias and prejudice leaves the matter exactly where it was when the affidavit was filed. All that means, as counsel and Judge Davis knows, that the matter is left entirely at his discretion, that he will serve as the presiding judge or whether he shall make the request for a visiting judge.
>
> "That observation is made without any long range suggestion. The judge can then follow any one of those courses. It is a matter for him to decide whether he shall hear it or whether he shall ask the assignment of a visting judge." (R., 960.)

The trial judge—Davis—chose to preside at the trial of the petitioner, and his bias and prejudice as deposed in the above-mentioned affidavit of the petitioner became more apparent as the cause proceeded. The indictment was returned on December 5, 1944. It contained six counts, three of which charged petitioner with accepting

a bribe, and three counts charging two known gamblers of giving bribes to him. (R., 2-6.) Your petitioner filed a motion on January 25, 1945, asking that he be tried separately and apart from the said gamblers. (R., 21-22.) The trial judge did not pass on this motion until June 19, 1945, the day the trial of this cause began. (R., 46.) It was then sustained. The petitioner did not know until the actual beginning of the trial whether he would be tried jointly with alleged gamblers and bribe givers, or whether he would be tried separately. This action of the trial judge manifestly placed the petitioner at a serious disadvantage in preparing his defense, as his defense in a joint trial would obviously be different than in his defense if separately tried.

Petitioner has contended, pleaded and argued, and filed two affidavits of prejudice, knowing himself and insisting that the bias and prejudice of the trial judge would absolutely preclude him from having a fair trial.

Your petitioner early requested the prosecution for a bill of particulars. (R., 11.) The prosecution gave petitioner a sham bill of particulars which merely re-stated the charges in the indictment. (R., 37.) Your petitioner then moved the court for an order requiring the furnishing of a bill of particulars under the provisions of Section 13437-6 of the General Code of Ohio, which provides in part as follows:

> "Provided, that the prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged." (R., 41.)

The court overruled this motion for a bill of particulars. (R., 47.)

Petitioner's apprehension over the vagueness of the sixth count in the indictment, and his insistence that he be apprised by a bill of particulars the charge against him, was clearly warranted, as his conviction on this count was the only one upheld by the Ohio Supreme Court. (R., 195.) This count merely charged that for a period of three and a half years from January 1, 1941 to July 1, 1944, petitioner had accepted large sums of money as a bribe. (R., 5.) His conviction on this count was upheld on the theory of a conspiracy which he certainly could not be expected to meet under this indictment. By denying petitioner a bill of particulars, the trial judge again displayed his bias and prejudice.

As the prosecution presented its evidence, it developed that its theory was based upon a conspiracy, and that the charge in the indictment was only incidental to the conspiracy.

This is succinctly stated in paragraph eight of the syllabus laid down by the Supreme Court of Ohio in this language:

> "It is not necessary that such conspiracy be one to permit the identical offense charged in the indictment, it being sufficient that the offense charged in the indictment be incidental to the conspiracy." (R., 171.)

By reason of his sharing of his chambers with the assistant prosecuting attorney appointed by him, and his conferences with his appointed prosecuting attorney, the trial judge learned of the theory of the case as it would

be presented by the prosecution. He was ready to rule on the question of conspiracy when it arose in the trial. (R., 607-609.) For months the prosecution had been building up its case of conspiracy; the trial judge knew it, yet the petitioner was denied this knowledge by the action of the court in overruling his motion for a bill of particulars, the right to be informed of the nature of the cause against him. This placed the petitioner at a most serious disadvantage. The refusal of the trial court to permit the petitioner to be advised of the true nature of the charge against him was but another example of the studied bias and prejudice that the trial court entertained against the petitioner.

As it became more evident that the trial judge was going to exert every effort and use of his office to obtain the conviction of petitioner, the latter, in an attempt to assure himself at least a fair and impartial jury, filed the following motion on June 13, 1945, six days before the trial began:

> "Now comes defendant, Jerome A. Nevius, and by his counsel, Paul M. Herbert and Aaron J. Halloran, and moves that the court shall order a number of jurors to be drawn by the jury commissioners for immediate service in the trial of the above entitled cause, and that each and every juror to be called before the court in the trial of this cause shall be drawn from the jury wheel." (R., 44.)

The trial judge never ruled on this motion.

The trial judge selected the jury which was to try and did try the petitioner. (R., 57.) A regular venire of jurymen had been drawn and summoned and were available for the trial. However, a special venire of

twenty-two names was drawn from the jury wheel. Strangely enough one member so drawn had served on the grand jury which indicted the petitioner. A challenge to the array for this reason was sustained. (R., 52.) Twenty-two more names were then drawn from the jury wheel. (R., 53.) These names were quickly exhausted because of the great public interest in the cause, and the members of this venire were excused by the trial judge. At this juncture, the prosecution moved the court to select personally talesmen rather than to draw additional names from the jury wheel. (R., 57.)

Simultaneously the petitioner moved that the court draw additional names of jurymen from the jury wheel. (R., 209.) The court ignored petitioner's motion, but sustained the motion of the prosecution, retired to his chambers, and drew up a list of personally selected talesmen, to serve as jurors in the cause. (R., 57.) In all, the trial judge personally selected fifty-five persons before a jury was complete. (R., 94-99.) Not knowing the trend and extent of the motives of the trial judge in selecting the jurors as will hereinafter be disclosed, the petitioner stated that he was satisfied with the jury.

Becoming apprehensive of the unusual procedure followed by the trial judge in personally selecting fifty-five talesmen, petitioner caused an investigation to be made by a reputable investigating agency of Springfield, Clark county, Ohio. (R., 89.) Then for the first time, petitioner, after studying the report, realized that all fifty-five of the talesmen personally selected by the trial judge were of the Protestant faith, and that not one member of the Catholic faith, the Hebrew faith, or the Negro

race had been included in the list of talesmen so selected. (R., 89.) These excluded religious faiths and race comprise thirty percent of the population of the county. (R., 90.) Your petitioner is a Catholic, and this was widely known, as he was very active in the church of his faith. This was a studied manipulation of the system of procuring jurors by the trial court to deny to the petitioner an impartial jury and a fair trial. It is but further evidence of the bias and prejudice shown by the trial judge against the petitioner throughout the entire proceedings. Years ago in Clark county strong feeling was aroused against members of the Catholic faith and other minorities, and the colored race. This feeling is still present.

Following this court's opinion in Glasser v. United States, 315 U. S., 60, your petitioner submitted evidence and proffered proof to support his affidavit that the jury panel contained only persons who were of the Protestant faith and the white race, and that this situation arose from an unfair manipulation of the method of selecting jurors. The trial judge not only refused to consider this evidence, but ordered it physically stricken and expunged from the record. (R., 104-105.) This was done at the hearing on the motion for a new trial. In the twenty-two names of jurors drawn from the jury wheel, and which were excused by the trial judge, there were five Catholics, and one Negro. In the fifty-five designated by the trial judge, not a single member of the minority faith and race were selected. The trial judge knew, and it was widely known throughout the county, that petitioner was a member of the Catholic faith. He

had been active in his church, and was identified with that faith. The trial court purposely and deliberately, knowing these things, refused to draw a jury from the jury wheel, which would have resulted in a fair and impartial jury, but resorted to a list which he had prepared himself. Petitioner again raised this whole question of the prejudice and bias of the trial judge and of the selection of the jury and the results thereof on a motion for a new trial. This motion was overruled, and we quote from the opinion of the trial court:

> "But as already indicated, the basic question is: did the defendant have a fair trial before a fair and impartial jury?" (R., 119.)

Petitioner appealed his conviction to the Court of Appeals, which court did not need to decide whether petitioner had been given a fair and impartial trial or whether the prejudice and bias of the judge had deprived him of his rights under the Fourteenth Amendment to the Constitution of the United States inasmuch as they reversed on the weight of the evidence. The Court of Appeals discharged petitioner on the second and sixth count of the indictment and remanded the cause for a new trial on the fourth count in the indictment. They based their reversal and discharge on the weight and sufficiency of the evidence and did not decide whether the trial court had been prejudiced and biased or whether petitioner had been given a fair and impartial trial.

The prosecution carried this case to the Supreme Court of Ohio and consequently did not themselves raise the federal question on their appeal. In the opinion of the

Supreme Court of Ohio the federal question was not even mentioned, and the only notice that we received from our argument that we had been deprived of our rights under the Fourteenth Amendment of the Constitution of the United States was the statement in the opinion that:

> "We are of the further opinion that it does not affirmatively appear from the record that the accused was prejudiced or prevented of having a fair trial." (R., 194.)

Justice Charles Zimmerman, of the Supreme Court of Ohio, a resident of Springfield, Clark county, Ohio, and acquainted with the parties to the action, withdrew from consideration of the cause when it reached the Supreme Court of Ohio for the reason that he was a resident of Springfield and was acquainted with the parties and had heard the case discussed. Contrast this recognition of the integrity of the courts with the determined and persistent stand taken by the trial court that he would not step aside and request that another judge be assigned.

The Ohio Supreme Court upheld the appellate court in discharging petitioner on the second count, reversed the appellate court on remanding the cause for a new trial on the fourth count, but rather discharged petitioner on that count on a question of jurisdiction. They reversed the Court of Appeals' findings on the sixth count and held that a conspiracy had been proven and consequently petitioner should be held on the sixth count, and that the Court of Appeals erred in discharging him on that count.

Petitioner filed an application for re-hearing in the Supreme Court of Ohio, and therein again specifically called to the court's attention that he had been denied the protection and guaranty of the Constitution of the United States. (R., 196.) It was urged that petitioner had been deprived of his constitutional rights to a fair and impartial trial because of the prejudice and bias of the trial judge, and the resultant effects this had upon the trial of the cause. (R., 197-200.) He specifically pointed in his application to the various points which he had raised at the earliest possible time that he had been deprived of his constitutional rights, and he likewise pointed out that the Supreme Court had ignored these contentions as had the Court of Appeals. (R., 198.)

Such, then, is the state of the record as it now exists as we present this petition for a writ of certiorari.

JURISDICTION OF THIS COURT.

A.

The jurisdiction of this court is invoked under Section 237 (b) of the Judicial Code, (28 U. S. C. A., 344) as amended by act of January 31, 1928, Chapter 14, 45 Stat., 54.

B.

Your petitioner was denied rights and privileges guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The pertinent portion of which is as follows:

> "Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the Constitution of the United States and its protection was denied the petitioner. The pertinent portion thereof follows:

> "By an impartial jury", and also "and to be informed of the nature and cause of the accusation."

C.

The judgment in this cause was rendered by the Supreme Court of Ohio on January 15, 1947. An application for rehearing was filed January 29, 1947, in accordance with the rules of practice of said court, was entertained, considered and denied February 13, 1947.

THE MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED IN STATE COURTS.

A federal question was squarely raised in this case. First in an affidavit of prejudice and bias made by petitioner in an attempt to remove the trial judge prior to trial. The hearing on this affidavit was had before the chief justice of the Ohio Supreme Court who held that petitioner had not or would not be deprived of his rights under the Fourteenth Amendment to the Constitution of the United States. (R., 958.) The federal question was argued throughout this case. It was squarely saved in the assignment of errors to the Court of Appeals. (R., 124-125.) It was saved at all stages of the proceedings by continual argument and objection to the method and system used by the trial judge in convicting petitioner. It was strenuously argued in an application for re-hearing before the Supreme Court of Ohio. (R., 197-200.) The trial court gave very little attention to this federal question. From the opinion of the trial court the following is quoted:

> "But as already indicated, the basic question is: did the defendant have a fair trial before a fair and impartial jury?" (R., 119.)

The Court of Appeals gave no more attention to the strenuous arguments made by petitioner that he had been deprived of his rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States merely stating that they had considered the other assignment of errors and found them without merit.

However, it should be said that the Court of Appeals did reverse the trial court in all of its findings. The Supreme Court of Ohio likewise gave little attention to the biggest point argued by your petitioner, that of the prejudice and bias of the trial court in selecting his own jury. From their opinion we quote:

> "We are of the further opinion that it does not affirmatively appear from the record that accused was prejudiced or prevented of having a fair trial." (R., 194.)

Petitioner did everything in his power to properly and squarely save this federal question in the state Supreme Court. The state had appealed this case and consequently did not raise the federal question in their assignment of errors. Petitioner did not file a cross-assignment of errors, but this was not necessary under Ohio law in order for the Ohio Supreme Court to decide this question. Clark v. Stuart, 126 O. S., 263.

The federal question fairly presented by the record was necessary to a determination of this cause, and there was no adequate non-federal ground for the decision. Chapman v. Goodnow's Administrator, 123 U. S., 540, 8 S. Ct., 211, 31 L. Ed., 235. The failure of the appellate courts to refer directly to the federal question in their opinion does not establish that the questions were not properly raised in these courts. International Harvester Company of America v. Missouri, etc., 234 U. S., 199, 34 S. Ct., 859, 58 L. Ed., 1276. Federal rights are denied as well by a refusal of the state courts to decide questions presented as by an erroneous decision of them. Lawrence v. State Tax Commission of Mississippi, 286 U. S., 276, 52 S. Ct., 556, 76 L. Ed., 1102, 87 A. L. R., 374.

The federal question and the ground therefor, were brought to the attention of the state courts with "fair precision", and the record as a whole shows expressly, or at least with clear intendment, that this was done. New York, ex rel. Bryant, v. Zimmerman, 278 U. S., 63, 49 S. Ct., 61, 73 L. Ed., 184, 62 A. L. R., 785.

The particular clause of the Constitution relied upon and the rights claimed thereunder unmistakably appear. Michigan Sugar Company v. Michigan, 185 U. S., 112, 22 S. Ct., 581, 46 L. Ed., 829.

Each of the questions raised was substantial. Zucht v. King, 260 U. S., 174, 43 S. Ct., 24, 67 L. Ed., 194. Each denied to petitioner fundamental rights to a fair trial guaranteed as a part of due process of law under the Fourteenth Amendment to the Constitution of the United States.

Your petitioner has at all times during the trial and appeal of this cause contended that the open prejudice and bias of the trial judge, the refusal to furnish a bill of particulars, and the improper selection of talesmen from the Protestant faith alone, have deprived him of his rights without the due process of law guaranteed to him under the Fourteenth Amendment to the Constitution of the United States. However, if this court feels that the record does not show that the federal question was raised and necessarily determined, we respectfully request that you vacate the judgment and remand the record to the state court to enable it to show the federal question and its disposition. State Tax Commission v. VanCott, 306 U. S., 511; Patterson v. Alabama, 294 U. S., 600, 55 S. Ct., 575, 79 L. Ed., 1082.

QUESTIONS PRESENTED.

Petitioner believes that all of the questions presented on his appeal are important and that they appear fully in the specifications of errors in the brief in support of the petition herein. However, there are two main questions presented here which concern the violation of petitioner's constitutional rights, and he believes they involve questions of national importance:

(1) Did the open prejudice and bias of the trial judge as evidenced by his actions and rulings before trial, during the trial and after trial deprive petitioner his rights under the Fourteenth Amendment to the Constitution of the United States?

(2) Did the trial and conviction of petitioner for the commission of a crime by a jury from which all members of the Catholic and Jewish faith and of the Negro race were systematically, intentionally and deliberately excluded, deny to petitioner his rights under the Fourteenth Amendment to the Constitution of the United States?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Ohio Supreme Court is in direct conflict with the decisions of this court. After being fully apprised of the method by which the trial judge selected the jury, and of the fact that all of the talesmen selected by the trial judge were Protestants when the defendant himself was a Catholic, the Supreme Court of Ohio said in its opinion:

> "We are of the further opinion that it does not affirmatively appear from the record that the accused was prejudiced or prevented of having a fair trial."

This court has consistently held that a jury must be selected from a "cross-section" of the community. Glasser v. United States, 315 U. S., 60; Thiel v. Southern Pacific Railroad, 66 S. Ct., 984; Ballard v. United States, 67 S. Ct., 261. The Ohio Supreme Court gave absolutely no heed to these decisions and completely ignored petitioner's rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States as interpreted by this court.

The trial court completely ignored the direction of this court that there should be no discrimination against any racial or religious group in the selection of a jury and that it is a denial of procedural due process and equal protection in criminal cases to purposely omit a minority racial or religious group in the selection of a jury.

With the continued rise of racial and religious hatred groups in this country, it becomes ever more essential that this court squarely pass upon the question of whether a court or any governmental agent can purposely omit minority religious groups in their selection of juries. This court has on many occasions held that it was necessary to at least include members of the colored race in the consideration of prospective jurors. Powell v. Alabama, 287 U. S., 45; Norris v. Alabama, 294 U. S., 587; Patterson v. Alabama, 294 U. S., 600; Hollis v. Oklahoma, 295 U. S., 394; Brown v. Mississippi, 297 U. S., 278. This court has many times stated that it was likewise necessary to give consideration to minority religious groups. Strauder v. West Virginia, 100 U. S., 303; Smith v. Texas, 311 U. S., 128; Thiel v. Southern Pacific Railroad, 66 S. Ct., 984; Ballard v. United States, 67 S. Ct., 261; Carter v. Texas, 177 U. S., 442; Glasser v. United States, 315 U. S., 60. However, this court has never directly had before it the question of studied and intentional elimination of minority religious groups by the court in the selection of juries, and when an accused cites the various cases handed down by this court, he is always confronted with the problem of "dicta", and the state courts in defense of the unconstitutional methods used by trial judges in their designation and selection of jurors are quick to override and literally overrule the decisions of this court by stating that it was mere dicta in the opinion of this court. This court should now directly pass upon these religious issues in the selection of jurors.

Your petitioner feels that the only reason that the state courts did not pass upon this question was because they

did not want to raise the religious issue herein involved. As in the past, it is necessary again for an accused to look to the Supreme Court of the United States to have the rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States assured. State courts will not pass upon these questions unless they are absolutely forced to do so.

We respectfully submit that this court should decide this grave constitutional question which is of utmost importance to minority religious groups and consequently to the whole nation. The state courts are in great need of further direction from this court on this question.

CONCLUSION.

Wherefore, petitioner prays for the allowance of a writ of certiorari to the Ohio Supreme Court in this cause, in order that it may be reviewed and determined by this Honorable Court, and that execution of the judgment appealed from be stayed pending its review by this court.

Respectfully submitted,

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ROBERT E. TEAFORD,
FRANK L. NEVIUS,
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AARON J. HALLORAN,
Of Counsel.

BRIEF.

OPINION OF THE COURTS BELOW.

This case in the trial court was not reported, but the trial court's opinion appears on pages 113 to 122 of the record. The Court of Appeals' opinion is reported in 77 Ohio App., 161, and appears on pages 141 to 163 of the record. The Ohio Supreme Court's opinion is reported in 147 O. S., 263, and appears on pages 169 to 195 of the record.

JURISDICTION OF THIS COURT.

A full statement of the jurisdiction of this court appears on page 15 of petition, and for brevity is not repeated here.

STATEMENT OF THE CASE.

A full statement of the case appears in petition, commencing on page one, and for brevity is not repeated here.

SPECIFICATION OF ERRORS.

The Supreme Court of Ohio erred in affirming the errors of the trial court as follows:

(1) The trial court, before, during and after the trial of the petitioner displayed marked prejudice and bias against petitioner in the following particulars:

(a) The trial court personally selected fifty-five talesmen from which the jury was finally chosen, and in so

doing wrongfully manipulated the laws of Ohio providing for the selection of a jury, resulting in the seating of a jury which was not truly representative of the community of Clark county, Ohio; excluded from the jury racial and religious minorities—those of the Catholic and Jewish religious faith and members of the Negro race—constituting 30% of the population of said county; compelled petitioner, a known member of the Catholic faith and active in his church, to stand trial before a jury so manipulated and selected by the trial court from members of the white Protestant faith.

(b) The trial court erred in refusing to hear or consider petitioner's proof of said manipulation in the selection of the jury; erred in physically expunging such proof from the record; erred in sustaining motion of the prosecution to deny petitioner's right to present evidence of such manipulation in the selection of the jury, and present proof that the jury was not properly constituted, or truly representative of the community.

(c) The trial court erred in refusing to order the prosecution to furnish the petitioner with a bill of particulars apprising and informing petitioner of the nature of the charge that he was required to meet; erred in compelling petitioner to stand trial upon a charge of conspiracy without any allegation in the indictment apprising petitioner of any such charge of conspiracy and that offense actually charged in the indictment was merely incidental to conspiracy; erred in compelling petitioner to stand trial wherein the prosecution prepared its case and introduced its evidence wholly on the theory of a conspiracy, no allegation thereof appearing in the indictment.

(d) The trial court refused to grant a hearing to the petitioner, as prosecutor of the county of Clark, Ohio, before finding that the petitioner was under a disability precluding him from the performance of his official duties.

(e) The trial court erred in taking a personal interest in the preparation of the case against the petitioner; participating in conferences with the attorneys for the prosecution in preparation of the case; securing the assignment of two members of the highway patrol of Ohio to take an active part in the interviewing of witnesses and the assembling of evidence for the prosecution; in conferring with these highway patrolmen; in conducting hearings wherein witnesses were sworn to give testimony against the petitioner after indictment was returned and without notifying petitioner of such hearings and denying petitioner's right to be present at such hearings.

(f) The trial court erred in refusing to pass upon petitioner's motion for severance filed on January 25, 1945, until the day of the commencement of the trial, June 19, 1945, thereby denying to petitioner his right to be accorded reasonable opportunity to prepare his defense to the charge upon which he was to stand trial.

(2) The Supreme Court of Ohio erred in affirming the decision of the chief justice of said court in refusing to assign another judge to preside at the trial after hearing was had upon two affidavits of prejudice and bias filed by the petitioner against the trial court in the following particulars:

(a) It was established at said hearing that the trial court had a financial interest in securing a conviction of the petitioner; the trial court itself was an important participant in a gambling syndicate which was operating widely in Clark county and feared a grand jury investigation of his gambling activities by the petitioner; that the trial court was the accuser, selected the jury and was the judge.

(3) The Supreme Court erred in denying petitioner's application for rehearing.

(4) The Ohio Supreme Court erred in not directly passing on petitioner's contention that the deliberate and intentional exclusion of minority religious and racial groups from the jury panel was in violation of the due process of law clause in the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

FIRST POINT.

The trial of petitioner by a jury selected from talesmen from which all members of the Catholic and Jewish religious faith and members of the Negro race were systematically, intentionally and deliberately excluded by direct manipulation in the selection of a jury denied petitioner of the equal protection of laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

This court has held on numerous occasions that the deliberate and intentional exclusion of the Negro race from trial juries either by statute or by action of court officials violated the equal protection clause of the Fourteenth Amendment.

Strauder v. West Virginia, 100 U. S., 303, 25 L. Ed., 664;
Neal v. Delaware, 103 U. S., 370, 26 L. Ed., 567;
Carter v. Texas, 177 U. S., 442, 44 L. Ed., 839, 20 S. Ct., 687;
Rogers v. Alabama, 192 U. S., 226, 48 L. Ed., 417, 24 S. Ct., 257;
Norris v. Alabama, 294 U. S., 587, 79 L. Ed., 1074, 55 S. Ct., 784;
Hale v. Kentucky, 303 U. S., 613, 82 L. Ed., 1050, 58 S. Ct., 753;
Peirre v. Louisiana, 306 U. S., 354, 83 L. Ed.,. 757, 58 S. Ct., 536;
Smith v. Texas, 311 U. S., 128, 85 L. Ed., 84, 61 S. Ct., 164;
Hill v. Texas, 316 U. S., 400, 86 L. Ed., 1559, 62 S. Ct., 1159.

There can be no doubt that where a trial judge intentionally excludes any group of persons from jury service in an attempt to manipulate the jury on some ground which has no relation to their qualifications to serve as jurors raises a question under the equal protection clause when the exclusion is based on race and religion.

It has been held to be a denial of the equal protection of laws under the Fourteenth Amendment intentionally and deliberately to exclude from a jury members of the Roman Catholic faith.

Juarez v. State, 102 Tex. C. R., 297, 277 S. W., 1091.

There were absolutely and intentionally eliminated from the talesmen from which the petitioner's jury was chosen all members of the Catholic and Jewish faith and of the Negro race.

This exclusion was systematic, intentional and deliberate. The trial judge in an attempt to manipulate the selection of a jury which was not truly representative of the community excluded all racial and religious minorities when such minorities constituted thirty percent of the population of the county. This judge on being confronted with an affidavit setting up the exclusion of these groups and with documentary evidence supporting this affidavit not only failed to consider the affidavit and evidence but ordered all of the documentary evidence completely stricken and physically expunged from the record. This was error. This court stated in Carter v. Texas, 177 U. S., 442:

> "While it is error to refuse to hear evidence offered in support of allegations that a jury was improperly constituted."

There can be no doubt in this case that there was a deliberate discrimination against these minority groups, and the judge's action in not considering the proof proffered definitely showed that the discrimination was planned and intentional. As stated in Lane v. Wilson, 307 U. S., 268:

> "The amendment nullifies sophisticated as well as simple-minded modes of discrimination."

This court in Smith v. Texas, 311 U. S., 128, 132, stated:

> "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction can not stand."

In this case fifty-five talesmen selected by the trial judge were all of the Protestant faith. It is impossible that "chance and accident alone" could have brought about the exclusion of all members of the minority religious faiths and of the Negro race.

Smith v. Texas, supra, at page 131.

The trial judge in defense of his action in selecting talesmen in this case, ruled that this was a long established method used by the courts in Ohio. This court has stated:

> "the mere fact that procedures for the choice of jury panels are of long standing or are exercised with the best motives will not prevent their invalidation".
> Glasser v. United States, 315 U. S., 60, 86.

There was absolutely no reason for the trial judge to personally select talesmen in this case unless he intended a deliberate manipulation in the selection of the jury

panel. The defense had moved the court six days before the beginning of this trial that all of the panel be drawn from the jury wheel, and the jury wheel had several hundred names in it. Twenty-two jurors were drawn from the jury wheel. Strangely enough a member of the grand jury that returned the indictment was in this panel. A challenge to the array was sustained. Twenty-two additional jurors were then drawn from the jury wheel. Of this number there were five Catholics and one Negro. The court discharged all of them but one Catholic who was peremptorily challenged by the prosecution. Thereupon the court refused to order more names drawn from the jury wheel, but made up a list of his own composed of fifty-five names from which the jury was ultimately chosen. Petitioner strenuously objected to this, and the trial court did not even bother to overrule his objection.

The trial judge had twice prior to the trial of this cause been challenged because of his prejudice and bias towards the petitioner. Eighty affidavits by citizens of the community had been filed charging that the trial judge could not sit in this case in a fair and impartial manner. In spite of all of this, when the judge should have been doubly sure that everything possible was done to show his impartiality, he refused to permit prospective jurors to be drawn from the jury wheel. No excuse can be given for his actions. This was a deliberate and intentional attempt to manipulate the selection of the jury. Petitioner knows and offered proof that all minority religious groups and members of the Negro race were omitted from the group from which the jury was impaneled. He has no way of knowing whether other

groups or classes were likewise eliminated. The action of the trial judge in view of everything that had gone before definitely deprived petitioner of a fair and impartial trial, and the equal protection of the law guaranteed to him by the Fourteenth Amendment. There can be no doubt that petitioner, a member of the Catholic Church, and very active in his religion, was denied his rights under the Constitution of the United States by the deliberate and intentional exclusion of members of his religious faith from the jury panel.

The jury as chosen was in no manner representative of the community. This court stated in Glasser v. United States, 315 U. S., 60, 85-86, with reference to the selection of jurors:

> "And, if exercised must always accord with the fact that the proper functioning of the jury system, and indeed, our democracy itself, required that the jury be a 'body truly representative of the community,' and not the organ of any special group or class."

This court stated in Smith v. Texas, 311 U. S., 128, 130:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

And further:

> "Discrimination to result in the exclusion from jury service of otherwise qualified groups not only violate our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

In Juarez v. State, 102 Texas Cr., 2987, 277 S. W., 1091, that court held:

> "In bringing about a violation of the provisions of the Fourteenth Amendment the State cannot do indirectly through its officers or agents that which it could not do directly by legislative acts. If the State should pass a law saying that hereafter no man holding to the Baptist religious faith, or the Methodist religious faith, or to the Roman Catholic religious faith, should ever be permitted to serve on a grand jury in this state, and a party adhering to the religious faith so designated should claim that by such legislative act his rights under the Fourteenth Amendment had been violated, the validity of such a law could never be sustained."

Petitioner was a member of one of the minority groups intentionally and deliberate eliminated. The prejudice to him was direct and violent. Beyond any doubt this discrimination greatly prejudiced petitioner.

SECOND POINT.

The trial of petitioner by a jury selected from talesmen from which all members of the Catholic and Jewish faith and all persons of the Negro race were systematically, intentionally and deliberately excluded, deprived petitioner of due process of law guaranteed to him in the Fourteenth Amendment to the Constitution of the United States.

The decisions of this court have long recognized that a jury "truly representative of the community" is one of the "fundamental principles of liberty and justice which lie at the base of our civil and political institutions." It

has been uniformly held that discrimination against race or religion in the choice of jury panels is improper.

Strauder v. West Virginia, 100 U. S., 303 (1880).

In Glasser v. United States, 315 U. S., 60, this court stated:

> "In all cases the constitutional safeguards are to be zealously preserved for the benefit of the accused."

And further:

> "The guarantees of the Bill of Rights are the protective bulwarks against the breach of arbitrary power."

And in Smith v. Texas, 311 U. S., 128, 130, this court stated:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

This court in a line of recent decisions has very clearly shown that a jury must be drawn from a cross-section of the community and that any discrimination against a minority group violates the due process clause in the Fourteenth Amendment to the Constitution of the United States.

In Glasser v. United States, 315 U. S., 60 this court stated:

> "A jury should not be selected by any process which involves a different intent and purpose than that of being truly representative of the community even if the motives influencing any other selective process are of the best nature and intent."

And:

"And, which exercise must always accord with the fact that the proper function of the jury system, and indeed our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not conform with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which would insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to irretrievable impairment of substantial liberties."

In Thiel v. Southern Pacific Company, this court stated:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Smith v. Texas, 311 U. S., 128, 130, 85 L. Ed. 84, 86, L. Ed. 680, 707, 62 S. Ct. 457.

This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be

given to the fact that those eligible for jury service are to be found in every class of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class dissensions and discriminations which are abhorrent to the democratic ideal of trial by jury."

In Ballard v. United States, 67 S. Ct., 261, this court reiterated its holdings in Smith v. Texas, supra, Thiel v. Southern Pacific Company, supra, and Glasser v. United States, supra, and further held:

'But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection."

And:

"The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

This court has continually and rigorously held that the intentional exclusion of any minority group in the selection of a jury panel violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. In the instant case all minority religious groups as well as members of the colored race were systematically and intentionally excluded. No other reason could be given for the trial court's refusal to continue to draw names from the jury wheel.

Petitioner was accordingly denied the due process of law guaranteed to him by the Fourteenth Amendment.

THIRD POINT.

The trial of petitioner before a judge who had openly displayed his prejudice and bias toward petitioner and who was directly interested financially and otherwise in the outcome of the trial and whose right to sit in the trial of the cause had twice been challenged by an affidavit of prejudice and bias deprived petitioner of due process of law as guaranteed to him in the Fourteenth Amendment to the Constitution of the United States.

The trial judge in this cause and the prosecuting attorney, petitioner herein, had for a long period of time been dealing at arm's length because the judge was not satisfied with the way the prosecutor's office was operated and because petitioner had threatened, and was attempting, to obtain an indictment against a corporation in which the trial judge was financially interested. Petitioner had absolute evidence that the corporation was engaged in a lottery which was in violation of state gambling laws. He had attempted to bring this evidence of violation of state gambling laws before a grand jury, which action greatly angered the trial judge and was directly responsible for the prejudice and bias displayed by the trial judge before the trial of this cause, during the trial and after the trial.

In this case the trial judge was the accuser. He appointed the special prosecuting attorney to carry out his accusation and obtain an indictment against petitioner; worked with the special prosecutor in preparing the case; obtained state highway patrol officers to aid said

prosecuting attorney; sat in the trial of this cause, and even selected the talesmen who were to comprise the jury panel.

In Sharkey et al, Police Commissioners v. Thurston, 268 N. Y., 123, it is stated:

> "It is a fundamental rule of our common law, embodied in the Constitution of our state and nation, that no person may be adjudged guilty and punished upon a charge of wrongful conduct. Decisions must await the hearing of the defense. The cause may not be prejudged, and no man may be both the accuser and judge. Otherwise a hearing becomes a fiction, and no fiction can destroy constitutional guarantees."

At the instigation of the trial judge and the special prosecuting attorney appointed by him, the court's action in obtaining an indictment against petitioner and all of the various matters leading up to the trial were given great publicity. It was a matter of public knowledge that this cause resulted from the direct action of the trial judge. Any verdict other than guilty in this case would have greatly embarrassed the trial judge because of his direct actions in this matter and further because of the great publicity given to his interest in this cause.

It is interesting to note that in spite of the fact that petitioner twice challenged the trial judge's right to hear this cause by affidavits of prejudice and bias, the trial court nevertheless continued throughout the trial of this cause to show that he was indirectly interested in obtaining a verdict of guilty. In spite of the fact that his right to sit as a fair and impartial judge had been so challenged, he would not protect petitioner's rights by hav-

ing a jury drawn from the jury wheel. He made no rulings in this case which would in any way tend to cast aside the prejudice and bias with which he had been charged.

Petitioner herein had twice gone before the Chief Justice of the Ohio Supreme Court and in open hearings made very grave accusations against this trial judge. These hearings were long and the accusations made therein were serious, and great publicity was given to the testimony offered. Petitioner had made many other grave charges against the trial judge which were publicized in the local press. For a trial judge to sit in a cause after he had been so accused, in and of itself, shows that he must have had a very direct interest in the case, otherwise he would have stepped aside for a visiting judge, and thus definitely and clearly vindicated himself of any charge of prejudice and bias.

As pointed out, supra, the trial court at the very inception of the trial, disclosed a studied determination to eliminate jurors who were members of minority religious and racial groups who had been drawn from the jury wheel. He then refused to draw further names from the jury wheel, but personally designated fifty-five talesmen from whom the jury was selected. He intentionally, systematically and deliberately eliminated all members of minority religions and races. This, petitioner contends, was a direct result of his prejudice and bias toward petitioner.

The trial judge had a very substantial financial interest in the outcome of this trial. He was a stockholder, director and vice-president of a corporation which was

carrying on a very lucrative lottery in his jurisdiction. Petitioner was attempting to obtain an indictment against this corporation for said gambling operations and had he been able to present this evidence to the grand jury, the judge would have sustained great financial loss. Petitioner's indictment and conviction precluded him from carrying on with this attempt to have the judge's corporation indicted.

In Whittaker v. McLean, 118 Fed. (2nd), 596, the court said:

> "A right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If before a case is over, a judge's bias appears to have become over-powering we think it disqualifies him."

The trial judge's prejudice and bias in this case was so strong that when confronted with documentary evidence in support of petitioner's contention that the jury had been improperly selected, the trial judge ordered all this evidence stricken from the record, and in his opinion attempted to justify his actions on the ground that if potential jurors were investigated such action would deter honest and honorable people from sitting on future juries.

This court has held that a financial interest in the outcome of a cause is enough to justify the removal of a trial judge. Tumey v. Ohio, 273 U. S., 510. Here we not only have a financial interest, but also a great political interest, as well as prejudice and bias, which the record clearly shows became almost uncontrollable as the trial of this cause proceeded.

CONCLUSION.

The judgment appealed from should be reversed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1946.

JEROME A. NEVIUS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

MOTION.

Now comes petitioner and petitions this court for an order dispensing with the printing of the record in this cause for the reason that said petitioner owns no property; has no savings or income and is dependent upon his friends and relatives for the funds to appeal this cause.

Wherefore, petitioner petitions for the granting of an order dispensing with the printing of the record in this cause.

PAUL M. HERBERT,
ROBERT E. TEAFORD,
FRANK L. NEVIUS,
Counsel for Petitioner.

AARON J. HALLORAN,
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